Doug Hartley, Inc.[1] ***and*** **San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.** Case 21-CA-18068

April 9, 1981

DECISION AND ORDER

On September 26, 1980, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge, citing *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), correctly stated that in 8(a)(3) discharge cases the General Counsel must first "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," and "[o]nce this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Applying these principles, he found that the General Counsel presented a *prima facie* showing sufficient to support the inference that the unionizing effort of Respondent's installation crew was a motivating factor in the decision to discharge them.[2] Nonetheless, he dismissed the 8(a)(3) allegation of the complaint because Respondent "more than demonstrated on th[e] record that the employees would have been discharged in any event, even if they had not engaged in protected activity in seeking union representation." We disgree that Respondent has met its burden to rebut the General Counsel's *prima facie* showing.

The Administrative Law Judge based his conclusion on one of the three reasons Respondent offered for its decision to terminate the crew members; i.e., the poor quality of their installation work[3] and their failure to work on August 4–5, 1979, at the Summers project. However, within a very few days after the mass discharge Respondent had rehired a majority of the crew, who continued to perform some installation as part of their employment duties. Respondent's owner, Hartley, explained that he rehired certain employees because they had worked in his warehouse prior to joining Supervisor Seymour's crew.

We find Respondent's explanations inadequate to meet its burden under *Wright Line*. The almost immediate rehiring of a majority of the crew that Respondent alleges were fired for incompetence and unreliability discredits Hartley's claim that the employees' poor workmanship motivated his decision to discharge them. Nor is Respondent's proffered justification for the discharges rehabilitated by Hartley's explanation that he rehired some employees because they had worked in his warehouse prior to joining Seymour's crew. We find this an unsatisfactory explanation for rehiring individuals to perform work for which they had only recently been discharged—if they had in fact been discharged for performing inadequately.[4] In addition, this explanation for the rehiring conflicts with another reason Respondent offered for the mass discharge; namely, that the crew was Seymour's and Hartley did not want to "steal" Seymour's livelihood.[5]

In sum, we find that Respondent's shifting and conflicting explanations for the discharges are entirely unpersuasive, noting especially the inconsistency in Respondent's immediately rehiring employees who were allegedly discharged for incompetence and unreliability. Indeed, after careful consideration of the entire record, we are convinced that the proffered reasons for Respondent's action were pretextual. We therefore conclude that, having found that the General Counsel made a *prima facie* showing sufficient to support the inference that the unionizing effort of its installation crew was a motivating factor in the decision to terminate them, Respondent has failed to meet its burden of showing that the discharges would have occurred even in the absence of the employees' protected activity. Accordingly, we find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging its installation crew on August 5, 1979.[6]

[1] The name of Respondent appears as amended at the hearing.

[2] We adopt, for the reasons stated in his Decision, the Administrative Law Judge's finding that the General Counsel has presented a *prima facie* showing—a finding to which Respondent has not excepted.

[3] Four contractors testified for Respondent as to the poor quality of the installation crew's work performed on their jobsites.

[4] Even had Respondent wanted the employees to perform warehousing work only—a premise not reflected in the record—it has offered no explanation for firing them rather than merely transferring them back to the warehouse.

[5] The Administrative Law Judge properly rejected Respondent's third reason for the discharges; i.e., that a purported understanding existed between Hartley and Seymour which required letting the entire crew go when Seymour left.

[6] The General Counsel also excepts to the Administrative Law Judge's failure to find on the basis of the testimony of employee Gardner that Respondent, through Supervisor Seymour, unlawfully interrogated Gardner concerning his union activities. Although this matter was not alleged in the complaint, it was fully litigated at the hearing, but the Administrative Law Judge neglected to discuss it. We find no 8(a)(1) violation for the following reason. The Administrative Law Judge specifically discredited this employee's testimony, that Hartley told him that he discharged the installation crew in order to protect himself against the Union, as a

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The General Counsel urges that Respondent's unlawful conduct is of such a nature as to warrant a bargaining order. We agree. We note that on August 1, 1979, prior to the discharges, 8 of the 11-member crew[7] had signed authorization cards, and that on August 15, 1979, Respondent received a mailgram from the Union asserting majority status and demanding recognition as collective-bargaining agent. Four days after the eight employees signed the authorization cards, Respondent unlawfully terminated the entire crew.

Respecting the seriousness of Respondent's unfair labor practices, we note that the entire unit of 11 employees was the object of Respondent's action. Unlawful discharge is misconduct which the Board and courts have long classified as "going to the very heart of the Act." See, e.g., *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941). Here, the discharge of the entire crew is a blatant example of Respondent's raw economic leverage, and the selective rehiring heightens the employees' awareness that they owe their jobs to Respondent's largess. This conduct is a classic illustration of "the fist in the velvet glove" tactics excoriated by the Supreme Court in *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, 409 (1964). It is clear that application of our traditional remedies cannot eradicate the lingering effects of Respondent's action to permit the holding of a fair and reliable election. In these circumstances, the employees' signed authorization cards are a more reliable measure of their representational desires. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 613–614 (1969).

We therefore conclude that, by refusing to recognize and bargain collectively with the Union and by engaging in the aforesaid unfair labor practices, Respondent violated Section 8(a)(5) and (1) of the Act, and that the policies of the Act will be best effectuated by imposition of a bargaining order.[8] Although the Union acquired majority status on August 1, 1979, and Respondent's unfair labor practices occurred on August 5, 1979, the Union's demand for recognition was not received until August 15, 1979. Inasmuch as Respondent's unfair labor practices are otherwise individually remedied by our Order set forth below, we shall date Respondent's bargaining obligation as of August 15, 1979. *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

CONCLUSIONS OF LAW

1. Doug Hartley, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of Respondent, excluding office clerical employees, guards, managerial employees, and supervisors within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By discharging Bob Comstock, Mike Gardner, Jack Klein, Tim Smith, Pat Carew, Ken Langley, Joe Langley, Frank Walsh, Bill Comstock, Greg Kelsey, and Ken Jordan on August 5, 1979, Respondent violated Section 8(a)(3) and (1) of the Act.

5. Since August 1, 1979, the above-named labor organization has been designated by a majority of the employees in the above-described unit as their exclusive representative for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing on August 15, 1979, and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has committed no other unfair labor practice.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action which we find necessary to effectuate the policies of the Act.

Having found that Respondent's discharges of all unit employees violated Section 8(a)(5) and (1) of the Act, we shall order Respondent to offer immediate and full reinstatement to all unit employees, if

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"story fabricated . . . to support the finding of a violation in this case." We view the testimony regarding the purported interrogation, although not expressly discredited, as similar in kind to the discredited testimony, and we refuse to find a violation based thereon.

[7] The General Counsel alleges that all employees of Respondent, excluding office clerical employees, guards, managerial employees, and supervisors within the meaning of the Act, constitute an appropriate unit. There is no evidence that Respondent employs employees other than the 11-member installation crew that fall within this description. We find that the above-described unit, which encompasses those employees unlawfuly discharged by Respondent, constitutes an appropriate unit.

[8] We further find that Respondent's egregious misconduct warrants a broad cease-and-desist order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

it has not already done so, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall further order Respondent to make these employees whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's discrimination against them, computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Finally, we shall order that, upon request, Respondent recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Doug Hartley, Inc., San Marcos, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in union activities.

(b) Refusing to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All employees, excluding office clerical employees, guards, managerial employees, and supervisors within the meaning of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) To the extent it has not already done so, offer Bob Comstock, Mike Gardner, Jack Klein, Tim Smith, Pat Carew, Ken Langley, Joe Langley, Frank Walsh, Bill Comstock, Greg Kelsey, and Ken Jordan immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon request, recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in San Marcos, California, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER ZIMMERMAN, dissenting:

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging its entire installation crew because some of the employees in the crew had commenced an organizing drive and had signed authorization cards. The majority, reversing the Administrative Law Judge, finds a violation. Since I am unwilling to join in inferring the facts necessary to find a violation, I dissent.

The Administrative Law Judge found that the General Counsel had made a *prima facie* showing that Respondent's actions were discriminatorily motivated. That finding is tenuous, at best. There is

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

not more than a scintilla of evidence to indicate union animus on the part of Respondent's owner, Douglas Hartley.

Further, in order to find Respondent's knowledge of the employees' union activities, one must look to the knowledge of Supervisor Seymour, who was terminated along with the installation crew; to Seymour's comments to Office Manager Cookman that the employees were planning "something" for which Hartley would blame Seymour, and to Cookman's testimony that "the office knew something was going on among the employees." Thus, the finding that the General Counsel made a *prima facie* showing hangs by a very slender reed.

I find it unnecessary to reach that issue, however, because I agree with the Administrative Law Judge that, even if the General Counsel made out a *prima facie* case, Respondent rebutted that showing with ample evidence that the employees were terminated for the unacceptable work of the crew, and for failing to report to the Summers worksite during the weekend preceding their discharge. The record is replete with unrebutted evidence of the poor quality of work performed by the installation crew. The failure of the crew to report to work on the Summers jobsite on Saturday or Sunday, August 4 and 5, 1979, to correct their previous work caused Respondent to face not only the loss of that job, but also the loss of a customer that had provided over $500,000 in prior business. That straw proved too much for the proverbial camel. Upon discovering that the crew had not worked that weekend, Hartley immediately fired Supervisor Seymour and the entire installation crew.

Thus, in agreement with the Administrative Law Judge, I find that Respondent would have terminated the installation crew for cause even assuming that it had knowledge of the crew members' union activities and harbored union animus. I would, therefore, dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT refuse, upon request, to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with San Diego County District Counsel of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteeed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL, to the extent we have not already done so, offer Bob Comstock, Mike Gardner, Jack Klein, Tim Smith, Pat Carew, Ken Langley, Joe Langley, Frank Walsh, Bill Comstock, Greg Kelsey, and Ken Jordan immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered by reason of our discrimination against them, together with interest.

WE WILL, upon request, recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees, excluding office clerical employees, guards, managerial employees, and supervisors within the meaning of the Act.

DOUG HARTLEY, INC.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed on August 7, 1979, by San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereafter called the Union) against Doug Hartley, Inc. (hereafter called the Respondent),[1] the Regional Director for Region 21 issued a complaint and notice of hearing on September 11, 1979.[2] The complaint alleges that a majority of the Respondent's employees in an appropriate unit designated the Union as their collective-bargaining representative on or about August 1; further, that the Respondent subsequently interrogated employees and then discharged all of the employees in the unit in order to discourage their engaging in union or other protected activity. The complaint also alleges that the Respondent failed and continues to fail to bargain with the Union upon request as the collective-bargaining representative

[1] The name of the Respondent appears as amended at the hearing.

[2] Unless otherwise indicated, all dates herein refer to the year 1979.

of the unit employees. It is asserted that by this conduct the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (hereafter called the Act).

A hearing in this matter was held on February 5, 1980, in San Diego, California; all parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy. Briefs were submitted by the parties and have been duly considered.

Upon the entire record in this case,[3] including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Doug Hartley, Inc., is a California corporation engaged in the business of installing windows and window frames, sliding doors and frames, and bathtub and shower enclosures in a new-construction housing being put up by contractors and developers in San Diego County, California. Its facility and place of business is located in San Marcos, California. The pleadings admit, and I find, that in the course of its business operations the Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, I find that the Respondent is an employer within the meaning of Section 2(2) engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The Respondent is owned by Doug Hartley, who until January 1979 was a sales representative in the San Diego area for manufacturers of aluminum windows and doors, shower enclosures, mirrors, and mirrored doors. Sometime in January, Hartley was persuaded by one of the manufacturers he represented (IGA) to go into the business of installing doors and windows for the various developers and contractors putting up homes in the area. Prior to this, the manufacturers normally hired union subcontractors to install their products or used their own in-house employees to perform this work. In April, Hartley entered into a written agreement with John Seymour whereby Seymour was to be in charge of all of the actual installation work performed on the various jobsites. (Resp. Exh. 2.)

Under the terms of the agreement, Seymour worked out of the Respondent's offices and scheduled the installation work with the superintendents on the various jobsites. He coordinated with Respondent's office employees to arrange the ordering of the windows and doors to meet the construction schedules and the ordering of supplies necessary to accomplish the installation work. The agreement required Seymour to schedule and supervise the work of the installers, provide certain supplies at his own expense, use and maintain equipment belonging to the Respondent in performing the work, and in general to be responsible for the actual installation of windows, doors, and enclosures at all of the jobsites. The agreement contained rates set by Hartley for each type of installation and the proceeds were to be put into an "incentive pool." From this pool, the Respondent was to pay all of the salaries of the installation employees, including the applicable taxes, and the balance was to be paid to Seymour on the 1st and the 15th of each month. The agreement further provided that Seymour was to remain as an employee of the Respondent until such time as he obtained his contractor's license. When this latter event occurred, the agreement was to be renegotiated. Finally, the agreement provided that either party could abrogate the arrangement upon 7 days' written notice.

B. *The Installation Work Under Seymour*

The record discloses that Seymour hired, set the wage rates for, and trained most of the employees who worked on the installation crew. For the most part, they were young individuals who had no previous experience whatsoever in the trade. Several of the employees (Bob Comstock, Mike Gardner, Jack Klein, and Tim Smith) had already been working for the Respondent in its warehouse at the time that Seymour assumed responsibility for the installation work. As warehouse employees, their duties were to cut and make the doors and windows and stake them on the trucks for delivery to the jobsites. Although it is not clear in the record, after these four employees were assigned to the field installation work, some or all of them continued to perform duties in the warehouse as well. Two individuals hired by Seymour (Pat Carew and Ken Langley) were journeyman carpenters knowledgeable in the trade and had previously been members of the Union by virtue of their employment prior to working for the Respondent.[4] All of the other employees working on the installation crew (Joe Langley, Frank Walsh, Bill Comstock, Greg Kelsey, and Ken Jordan) were inexperienced and, indeed, hardly knew which were the proper tools to be used in performing the work.

The inexperience of the installation crew was dramatically reflected in the quality of the work performed at the jobsites. Four different contractors testified as to the poor quality of the work performed on their jobsites by the installation crew. Their testimony indicates that much of the work had to be redone. Their complaints and similar ones from other contractors were recorded by Hartley and other office personnel in regularly kept

[3] The General Counsel filed a motion to correct portions of the official transcript. Upon consideration of the contents of the motion, it is hereby granted.

[4] Seymour was also a journeyman carpenter and had been a member of the Union through his prior employment.

notebooks when the complaints came in from the jobsites. (Resp. Exhs. 8 and 9.) These complaints show that the work was being performed in an incorrect and shoddy fashion. Windows were placed in the wrong frames, doors and windows were hung improperly, material for scheduled installations was not delivered to the jobsites or, if delivered, was out of sequence so that it impeded the work of other crafts on the projects. The net result of all of this was that many contractors and developers threatened to cancel their contracts with the Respondent and hold it liable for any monetary losses incurred.

Hartley testified that, in spite of the complaints from the job superintendents and contractors during the first few months of his arrangement with Seymour, he was tolerant because he felt Seymour was new at the job and he and the crew were learning the operation. Hartley stated he felt that they needed an opportunity to gain the necessary experience to do the work correctly. As the complaints continued to come in, he made on-site inspections in mid-July and found the situation was as bad as described by the contractors.

Seymour testified that several factors were responsible for the poor work performance of the installation crews. He stated that, when he scheduled employees to work on a particular jobsite, Hartley would come out and order them to other sites, many times considerable distances away. He said that Hartley "usurped" his authority over the supervision of the installation operation. In addition, the office personnel in many instances, according to Seymour, did not coordinate with his job scheduling. This resulted in the delivery of wrong products to many jobsites and, in other instances, a failure to supply products needed for installation at a scheduled time. Seymour also stated that the crew was not only inexperienced but also generally unreliable. Other than Carew and Ken Langley, he could not count on them to remain on a jobsite or do the work properly. As a consequence of this situation, a considerable number of disputes developed between the job superintendents and the members of the installation crew. On several occasions, the superintendents ejected the crew from the jobsites. On August 2, the Respondent received a letter from attorneys representing a developer (Henegar) asserting the Respondent had defaulted on its installation contract by failing to install 41 windows within the time set forth in the agreement. The Respondent was requested to perform forthwith and threatened with any money damages arising out of the failure to do the work within the contract time.

Seymour testified that he was dissatisfied with the whole operation and unable to make a living under the arrangements he had with Hartley. He called Hartley on August 2 and gave verbal notice under the contract that he was terminating their arrangement at the end of 7 days. Hartley did not object to Seymour ending their contractual relationship and told him, "Fine."

C. *The Employees Seek Representation by the Union*

Ken Langley and Frank Walsh testified they had been authorized by the installation crew in late July to look into the possibility of contacting a union to represent them. Langley and Walsh contacted representatives of the Union and arranged for them to meet with a group of employees at Langley's home on August 1. At this meeting eight employees signed authorization cards and gave them to the union representatives.[5]

The next night (August 2), several employees decided to tell Seymour of their intention to have the Union represent them. Carew, Ken Langley, and Walsh went to a local bar with Seymour and told him of the employees' intentions.[6] According to Langley, Seymour did not display any sentiment one way or the other when told of the plans of the employees. Walsh testified that Seymour indicated it was a good idea because the employees would get more benefits if represented by the Union.

The testimony of Dee Cookman, the office manager of the Respondent, indicates that, later that same evening, Seymour called and informed her that the employees were going to do something for which he felt Hartley was going to hold him responsible.[7] According to Cookman, Seymour did not tell her what the employees had in mind and she stated she did not repeat this conversation to Hartley until the following Monday—after the events involved in this case had occurred.

Gardner testified that, on August 3, Seymour called the warehouse to inquire about some windows. During the conversation, according to Gardner, Seymour asked the employee if he had signed a union card. Gardner asked, "What union card?" Seymour then said that he had been informed about the employees' "deal with the Union" and wanted to know if Gardner had filled out a card. Gardner told Seymour that he had not as yet signed an authorization card.

D. *The Discharge of the Installation Crew*

Hartley testified that on August 3 he went to a jobsite known as the Canyon Ridge Tract. He stated he went there because the developer (Summers) had advised him that the installation work was in particularly bad condition and, if he did not correct it by Monday (August 6), he would be thrown off the project.[8] Hartley stated his inspection verified the complaints made by the developer. According to Hartley, windows were lying around, some windows had been installed out of sequence, others had been installed incorrectly, and windows which should have been at the site were still in the Respondent's warehouse. He stated he spoke to Seymour at the tract and directed him to make arrangements to work Saturday or Sunday to correct the conditions before the Summers people started work on Monday. He instructed Seymour to have the office help do the paperwork so the warehouse employees could load the truck in order that the crew could start installing windows on Saturday morning.

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[5] The eight employees were Carew, Bob and Bill Comstock, Kelsey, Klein, and J. and K. Langley. Gardner did not sign a union card until August 13. (G.C. Exh. 4.)

[6] Seymour shared an apartment with Carew and Walsh.

[7] The testimony of Cookman indicates that she and Seymour were social acquaintances as well as employees of the Respondent.

[8] Summers provided the Respondent with its largest contracts for installation work. Up to this point, the Respondent had contracts with Summers totaling $500,000.

Hartley went to his office on Saturday and found no one there. He checked the jobsite and discovered the installation crew had not shown up. He returned to the warehouse and loaded the truck with the proper windows and took them to the jobsite. He then spread the windows so they could be installed over the weekend. He stated he visited the project on Sunday and found that none of the installation crew had reported to work. Hartley returned to his office and sent a telegram to Seymour accepting his "resignation" of August 1 and stated that the resignation included Seymour's full crew. He indicated the crewmembers' checks would be available on Monday and he would negotiate a final settlement with Seymour. Hartley testified that, at the time he sent the telegram to Seymour, he had no knowledge whatsoever of the plan of the employees to be represented by the Union.

Seymour called Hartley after receiving the discharge telegram. Hartley testified that Seymour asked about the telegram and he repeated that he was accepting Seymour's resignation and that of his entire crew. He stated he told Seymour that he and the crew failed to meet the deadline given the Respondent by Summers.[9] Walsh testified that he was listening in while Seymour talked to Hartley on the telephone. He stated that when Seymour asked why the entire crew had been fired, Hartley said he did not want to "steal" Seymour's crew. Walsh acknowledged that nothing was said between Hartley and Seymour about the employees seeking union representation. After the conversation between Hartley and Seymour, Walsh contacted all of the other crewmembers to notify them that they had been terminated by the Respondent.

Ken Langley testified that on August 6 he went to pick up his paycheck. Although he saw Hartley in the office, he did not discuss the reasons for the crew's termination. He stated he went to Seymour's desk and asked why the employees had been fired. According to Langley, Seymour indicated he had a labor contract with Hartley and, when he quit, the entire crew was part of the deal. Seymour pulled out a copy of his agreement with Hartley and gave it to Langley. Langley then went into Hartley's office and told Hartley that the contract with Seymour did not require firing the entire crew when Seymour quit. Langley testified that Hartley became angry and said the arrangement with Seymour was none of his business. Langley stated Hartley then stormed out of the office and demanded to know from Seymour why he had given a copy of the agreement to Langley.[10]

Klien reported to work that Monday and was told by Hartley that Seymour had quit and, when he did, his entire crew went with him. According to Klein, Cookman was sitting approximately 15 feet away at the time of this conversation. Klein stated that Hartley told him that, if he ever wanted to come back to work, they could talk about it later. Klein testified that, at approximately 1:30 that same afternoon, he and Hartley were talking outside the office and Hartley asked if he wanted to return to work. Klein indicated that he did and was instructed to report to work the following day. According to Klein, Hartley stated that he had a "funny feeling, that it had something to do with the Union, that he had to protect himself and that's why it seemed so funny to hire [him] right back after [he] just got fired."

Hartley denied telling Klein that he terminated the employees because they were planning to join the Union. He stated that he first learned about the employees' involvement with the Union from Klein that morning. Hartley testified that Klein came into the office and told him about the meeting between the employees and the union representatives. According to Hartley, Klein said he had been talked into going along with the employees but did not really like the idea. He asked if he could return to work and Hartley said that he would consider the possibility. Hartley denied telling Klein that he terminated the employees because they joined the Union.

Cookman testified that she overheard the conversation between Hartley and Klein. According to Cookman, Klein wanted to know what was happening and why the employees were fired. Klein told Hartley that he had been forced to go along with the other employees when they decided to join the Union. She stated that Hartley told Klein the employees were laid off because they were supposed to work over the weekend on the Summers project and had failed to do so. Cookman further testified that Klein asked to be rehired because he said he needed the job. Hartley then told Klein that if he came back, it would be under the same terms that existed before.

Gardner also testified to a conversation he asserted he had with Hartley on August 6. According to Gardner, he went to Hartley's office to find out what was going on because he had been advised by Langley and Walsh that they had been terminated. He also stated that when he arrived at work he found the locks had been changed. Gardner testified that, in response to his questions, Hartley said, "Seymour was playing games with him and had ideas about joining the Union," but he put a stop to it by firing everybody in installation. Gardner stated that he felt he was a part of the group and therefore had an obligation to quit. Hartley, on the other hand, testified that Gardner came into his office and notified him that he had decided to quit because everyone else was terminated. According to Hartley, Gardner stated that he was part of the crew and he was going to quit also. Hartley denied making any statements to Gardner about the employees' plans to unionize.

The testimony discloses that, in addition to Klein, the Respondent hired back a number of the employees who were discharged on August 6. Hartley stated that, about 10 days after his discharge, Gardner asked if he could get his job back and was rehired. He also rehired Tim

[9] Hartley lost a major portion of the Summers' contract due to the poor work performance on the project. He testified that he had to hire a union subcontractor to finish the windows and doors but lost the portions of the contract for installation of mirrors, mirrored doors, and tub and shower enclosures. He has not been given any further contracts by Summers.

[10] Hartley and Seymour testified they had a mutual "understanding" that the installation crew was to be considered Seymour's crew. Therefore, when Seymour left, it was understood that the crew would also leave so that Hartley could replace Seymour with another subcontractor who would provide his own crew.

Smith, who he made a leadman because he was the first employee hired to work in the warehouse when the Respondent went into installation work. The Comstock brothers (Bill and Bob) and Kelsey were also rehired, although the dates of their reemployment are not contained in the record. In response to the question as to why he rehired these individuals when their prior record on installation work was so poor, Hartley stated that, with the exception of Kelsey, they had all worked for him in the warehouse prior to his arrangement with Seymour. According to Hartley, they had learned the terminology for the windows while working as warehouse employees and had been instructed in the basic knowledge of installation work by Seymour. He asserted he felt they were not "friends or buddies" hired by Seymour. He also stated that they had not been given the proper supervision by Seymour because he (Seymour) was cutting corners in order to make more money under the incentive arrangement in the contract. Hartley indicated he felt that, if Seymour wanted to work for another manufacturer, he would have a sufficient crew left with the remaining individuals who were his friends.

In order to salvage the remaining contracts held by the Respondent, Hartley hired a union subcontractor to perform the work. However, the subcontractor refused to undertake the task of correcting the work on some of the existing jobs which had been performed by the Seymour crew because he did not want to be responsible for the poor workmanship. For this reason Hartley had to correct that work with the employees he rehired.

On August 13, the Union sent a mailgram to the Respondent asserting that it had been authorized to act as the collective-bargaining agent by a majority of the Respondent's employees. The Union requested a meeting to negotiate a collective-bargaining agreement and asked that the discharged employees be reinstated and paid for all lost time. (G.C. Exh. 2.) By way of a letter dated August 16, the Respondent, through its counsel, asserted a good-faith doubt that the Union represented a majority of its employees and rejected the request for a meeting. The Respondent also rejected the Union's request for reinstatement and backpay for the discharged employees. (Resp. Exh. 3.)

Concluding Findings

It is contended by the General Counsel that the Respondent discharged the installation employees because they were seeking representation by the Union. In support of this argument the General Counsel points to the timing of the discharges—occurring just 4 days after the employees signed union authorization cards. The General Counsel also contends that the various explanations offered by the Respondent to justify the discharges are conflicting and shifting; i.e., (1) the arrangement with Seymour required letting the entire crew go when Seymour left, (2) the Respondent did not want to "steal" the crew from Seymour, and (3) the crew was incompetent and unreliable. As evidence that this last claim was purley pretextual, the General Counsel points to the fact that a majority of the crew was rehired shortly after the mass discharge.

The Respondent, on the other hand, takes the position that Hartley had no knowledge of the union activities of the employees until so informed by Klein on August 6—1 day after the discharge telegram was sent to Seymour. The Respondent further asserts that the discharges were justifiable in that they were caused by the failure of Seymour and the crew to work on the Summers project over the weekend to correct the numerous mistakes and make the proper installations before the contractor started work the following Monday.

In my judgment this case falls squarely within the parameters of the latest "dual motivation" analysis just recently explicated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). It is evident that the basic question here rests solely on the motivation attributed to the Respondent; i.e., whether the employees were discharged for engaging in union or protected activities or whether they were discharged for legitimate business reasons as asserted by the Respondent. In *Wright Line* the Board stated that it would employ a causation test in cases of this nature whereby the General Counsel would be required to first "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" and "once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."[11]

Considering the entire record in this case, I find that the General Counsel has made a *prima facie* showing which warrants the inference that the employees' efforts to get the Union to represent them was a "motivating factor" in the decision to discharge them. Seymour, the supervisor of the installation crew, was told by several of the employees during the evening of August 2 about their intention to be represented by the Union.[12] Cookman testified that Seymour called her that same evening and informed her that the crew was planning something for which Hartley was going to blame him. While Cookman denied Seymour made any mention of the plan of the employees to join the Union during this conversation, she testified "the office" knew something was going on among the employees. It is highly unlikely that the office staff would have known that the employees were engaging in some activity affecting their jobs and Hartley not be aware of this fact, especially in an operation as small as the Respondent's.

I do not find, however, that Hartley told Gardner or Klein on August 6 that he was discharging the installation crew because they were joining the Union and he

[11] *Wright Line, supra* at 20–21.

[12] There is no question that Seymour was a supervisor under the arrangement with the Respondent. The written agreement with the Respondent specifically stated that Seymour would be an employee until he obtained his contractor's license and then the agreement would be renegotiated—an event which did not occur during Seymour's tenure with the Respondent. In addition, the employees were paid by Hartley and the unrefuted testimony indicates that, although the employees worked under Seymour's direction, there were many instances in which Hartley directly countermanded his orders and moved the employees from jobsites previously scheduled by Seymour. Thus, it is apparent that the members of the installation crew were employees of the Respondent and Seymour was the supervisor in charge of the actual installation work.

had to protect himself. Having observed Gardner and Klein while testifying, I am not persuaded that they were giving a true account of these conversations. The naked admission attributed to Hartley by Gardner and Klein is nothing more, in my judgment, than a story fabricated by these two witnesses to support the finding of a violation in this case.

Having found that Hartley was aware the employees were intending to be represented by the Union, I further find that this knowledge was a motivating factor in Hartley's decision to terminate the entire installation crew. Not only does the timing of the discharges—occurring 3 days after Seymour passed on information about the employees' plans—make this action suspect, but the explanations offered by the Respondent fall far short of being persuasive. Hartley and Seymour claimed they had a mutual understanding that when Seymour left, the entire crew left with him. But this understanding was not embodied in their written agreement which purported to govern their arrangement. Furthermore, while Hartley professed he did not want to "steal" Seymour's crew, he nevertheless rehired a majority of the employees within a short period after they were discharged. Moreover, these employees were hired under the same terms of employment that existed prior to the discharge. His explanation that he rehired the employees because they had worked for him before he entered into the arrangement with Seymour negates any claim that they were considered to be Seymour's "crew." Rather, it supports the contention that Hartley considered the members of the installation crew to be his employees, and that he wanted the employment relationship to remain on a nonunion basis. For these reasons, I find that the record does indeed support the inference that the protected activity of the employees was a factor in Hartley's decision to discharge them.

But having arrived at this conclusion, I am not persuaded that the Respondent would not have taken the same action against the employees on August 5, "even in the absence of [their] protected conduct." *Wright Line, supra* at 21. This record is replete with testimony and evidence of the faulty and shoddy workmanship performed by the installation crew at the various construction sites where the Respondent had contracts. The poor quality of work is not only reflected in the office records kept by the Respondent noting the complaints of the job superintendents, but also in the testimony of several contractors and developers at the hearing. In addition, the testimony of Seymour and Hartley presents a graphic disclosure of the inexperience and unreliability of the installation crew. Windows were improperly installed, many windows which were installed were put in the wrong frames, numerous windows were installed in the wrong sequence thereby disrupting the work of other crafts on the project, and there were numerous instances of windows left lying about so that they became damaged or broken. Seymour stated that if he or one of the more experienced employees (Carew or K. Langley) was not on the site, various members of the installation crew would leave and not perform any work at all.

It comes as no surprise that the faulty workmanship and poor work habits of the installation crew resulted in members of the crew being thrown off of jobsites by the job superintendents or that the Respondent suffered the loss of a substantial number of contracts with builders and developers. The climax occurred on August 3 when Summers (the Respondent's largest customer) directed that the faulty work on the Canyon Ridge Tract be corrected before August 6 or the Respondent would be put off the project. It is unrefuted in the record that when Hartley verified that the Summers' complaints were justified, he instructed Seymour to have the crew work on Saturday and Sunday to correct the condition. When he discovered that the crew did not show up at the project on either day during that weekend and because he was faced with a loss of a customer who had provided $500,000 worth of business, Hartley had ample and legitimate business justification for discharging the entire crew and terminating Seymour's services, even though the 7-day notice requirement in his agreement with Seymour had not expired.

For these reasons, I find the Respondent has more than demonstrated on this record that the employees would have been discharged in any event, even if they had not engaged in protected activity in seeking union representation. I further find that when the Union claimed it represented a majority of the Respondent's employees and requested negotiations, it did not occupy this status because the employees had been terminated. Therefore, when the Respondent rejected the Union's request to bargain, it did so without violating the Act.

In sum, I find on the basis of the evidence and testimony presented in this record that the Respondent has conclusively established that it would have discharged the employees on August 5 even if they had not engaged in protected conduct. Accordingly, I shall recommend that the complaint herein be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Doug Hartley, Inc., is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not engage in any conduct which violated Section 8(a)(1), (3), and (5) of the Act when it discharged its installation employees on August 5 and thereafter refused to bargain with the Union, who claimed to be the majority representative of its employees.

[Recommended Order for dismissal omitted from publication.]

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.